SUPREME COURT, U. S.

In the
Supreme Court of the United States
OCTOBER TERM, 1967

No. 873

ARCHIE COSTA,
PETITIONER,
v.
STATE OF CONNECTICUT,
RESPONDENT.

Respondent's Brief In Opposition To Petition For Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

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Statement of Issues

There is no justification upon the facts in the record to warrant Defendant's claim in his "Statement of Issues" that "The Defendant was innocent . . ."

Statement of the Case

The statement of the case by the petitioner requires the addition of the following:

During the trial of the case, the defendant, Archie Costa, was represented by F. Patrick Zailckas, who also represented the co-defendant, Alexander Costa; Attorney Zailckas was selected by the defendant, Archie Costa, to represent him with full knowledge that he also represented the co-defendant. (Rec. p. 18, Find. par. 63)

The record is also completely devoid of any indication that the defendant, during trial or in his motion to set aside the verdict, ever claimed he was denied the assistance of effective counsel.

Reasons for Denial of the Writ

The cause of the Petitioner is not entitled to review in the Supreme Court of the United States because he has not raised a federal question of any substance. The facts in the record clearly show that no action or omission by the State of Connecticut denied the Petitioner his rights to due process under the Fourth and Fourteenth Amendments of the Constitution. Petitioner engaged his own attorney prior to trial with full

knowledge that his attorney would also represent his brother. The authorities have universally pointed out the distinction between *lacking* the assistance of effective counsel and being *denied* the assistance of effective counsel. The latter is held to be the responsibility of the State; the former is held to be the sole responsibility of the defendant who selects his counsel. See, *Edge v. Wainwright*, 347 F. 2d 190 (5th Cir. 1965); *United States v. Handy*, 203 F. 2d 407, 426 (3rd Cir. 1953) and cases cited therein. Where the defendant selects his own counsel, commission of what may be in retrospect an error of judgment is not a denial of due process. Some responsibility on the part of the State, through its courts or officials, must appear in order to constitute a denial of due process. *In re Ernest's Petition*, 294 F. 2d 556 (3rd Cir., 1961); *People v. Mitchell*, 411 Ill. 407, 104 NE 2d 285, *cert. den.* 343 U. S. 969, 72 S. Ct. 1065, 96 L. ed 1364 (1952). The State should not be accused of a denial of due process unless it acts improperly or the defense of the accused is so grossly ineffective as to call for intervention. No such claim can be made in this case. In fact, trial courts must be careful to intervene in only the most extreme cases lest their interference be deemed unwarranted and such interference be treated as a denial of due process, for counsel and client have the right to plan defensive strategy in privacy and independently of the interference or dictation of the court. See, E.g. *People v. Frederick*, 20 Ill. 2d 240, 169 NE 2d 752, 759 (1960).

It is also apparent from the opinion of the Supreme Court of Connecticut that its judgment to affirm the conviction of the Defendant was based on the independent ground that his failure to raise at trial any of the

alleged errors claimed on appeal involves a complete disregard of settled Connecticut procedure. The Supreme Court of the United States generally declines to review State court judgments which rest on independent and adequate State substantive or procedural grounds. See. *Henry v. Mississippi*, 379 U. S. 443, 85 S. Ct. 564, 13 L. ed 2d 408 (1965).

Conclusion

The Respondent, State of Connecticut, respectfully submits that the petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Connecticut, entered in this case, July 18, 1967, should be denied.

STATE OF CONNECTICUT
Respondent

By its attorney,

Thomas F. Wall,
State's Attorney